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Supreme Court, U.S.
FILED

96 145 JUL 29 1996

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No.

In The
Supreme Court Of The United States
February Term, 1996

UNITED STATES OF AMERICA
EX. REL. DILIP K. PAUL,
Petitioner

v.

U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION and PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC., PB-KBB, INC. and BATTELLE MEMORIAL INSTITUTE,
Respondents

Petition For A Writ Of Certiorari
The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED FOR REVIEW

1. On page 2 of the ruling of the court below it stated, "Even if it is assumed that Paul can establish by clear and convincing that the defense was predicated upon factually false testimony, Paul has failed to demonstrate that he was prevented from fully and fairly presenting his state court case." Is it an error?

2. The court below stated on p-2 of the ruling, "Paul does not explain why the interests of the absent parties were negatively impacted because they were not joined as defendants in the state court action and he does not explain how the absent parties could have been liable to him under applicable state law." Is it an error?

2(a) The Court below stated on p-2, paragraph 2, "Even if the absent parties were "indispensable," their absence did not create a jurisdictional defect and does not provide a basis for collaterally challenging the state court's judgment." and then dismissed petitioner's appeal, Is it an error?

3. On page 3, the court below stated, 'the contracts at issue were negotiated and executed in Ohio "for performing work in Utah, in Texas, in Louisuana and in Mississippi...." Paul has abandoned this issue by failing to brief it on appeal.' Is it an error?

4. On p 3, the court below stated, "Paul contends that the Texas state courts were without jurisdiction to resolve legal issues involving claims that arose in other jurisdiction. Paul's argument goes to the subject-matter jurisdiction of the state court to adjudicate claims arising in other jurisdictions. While the place where the alleged tort occured may be pertinent to personal jurisdiction, venue, or the question of which forum's law should be applied, the fact that a claim arose in another jurisdiction and may have impacted that jurisdiction more directly is not determinative of the court's authority to render a judgment. see Tex. Const. art 5, § 8." Is this holding an error?

5. On page 4, the court below stated, "Paul's complaint was dismissed under the doctrine of res judicata". Is this holding an error?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest of this litigation. There are no parent or subsidiary companies which are required to be listed.

Petitioners: United States of America ex. rel. Dilip K. Paul

Respondents: U.S.District Court for the Southern District of Texas, Houston Division and Parsons Brinkerhoff, Quade & Douglas Inc., PB-KBB, Inc. and Battelle Memorial Institute

Indispensable parties could not be joined as defendants as per Restatement 2nd § 326 (contract): Thyssen Canada and its two Canadian domiciled employees; S. Poppen and J. Kanopka of Saskatchewan. Thyssen Canada was a PARTIAL ASSIGNEE of the PBQD/PB-KBB's contractual rights and obligations. Also it was a subcontractor for the design of the shaft.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reprinted in the Appendix, Pages 1 through 5.

That opinion affirmed the decision of the United States District Court for the Southern District of Texas, Houston of August 9 and september 6, 1995, denying Paul's motion filed under FRCP 60(b) and under 59 respectively, which are reprinted under Appendix 2 and 3 on pages 6 and 7 respectively.

The original opinion of the district court dismissing petitioner's complaint by applying the doctrine of res judicata is reprinted under Appendix 4 on pages 8 through 16. The order of Magistrate Marcia Crone denying petitioner's motion on discovery is reprinted under Appendix 5 on page 17.

JURISDICTION OF THIS COURT

The U.S. District Court in Houston had exclusive jurisdiction to try this case under 31 U.S.C. §§ 3730(b)(1), 3730 (c)(3), 3730(e)(4)(A) & (B), 3730(h), 3732(a). The U.S. District Court also had the exclusive jurisdiction to try this case under 28 U.S.C. §§ 1331, 1332(a)(2), 1345, 1355, 1357 and 1407. The United States Court of Appeals for the Fifth Circuit had jurisdiction over the matter pursuant to 28 U.S.C. § 1291. The judgment of that Court (Appendix 1) was entered on April 29, 1996. The jurisdiction of the Supreme Court is

invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Statement of the Facts

Battelle Memorial Institute of Columbus, Ohio, invited a bid on behalf of the Office of the Nuclear Waste Isolation (ONWI), Department of Energy in 1981, for designing and supervising of construction of 1/2 mile deep underground exploratory shaft facilities for nuclear waste isolation, to be located

(1) in Utah,
(2) in Texas,
(3) in Louisiana, and
(4) in Mississippi.

Parsons, Brinkerhoff Quade & Douglas, Inc. (hereafter PBQD), and PB-KBB. Inc., forming a joint venture known as PBQD/PB-KBB, and along with six subcontractors with people from six countries, spanning three continents, submitted a bid by falsely claiming their expertise and experience in designing the said facilities in subsurface salt formations containing pressurized pockets of highly explosive Methane gas and toxic Hydrogen Sulfide gas.

One of the subcontractors was the Canadian subsidiary of Thyssen Schachtbau, Mullenheim/West Germany.

PBQD/PB-KBB received a contract (No. E512-08900) in June, 1982, based on the misrepresentation. The contract specified that designs must be safe, suitable for nuclear waste isolation

purpose and they must comply with MSHA regulations which are applicable in gassy mines. The contract required that the designs of the facilities must be completed by the end of 1983, construction must be started at that time and be completed by 1985.

Petitioner was an employee of PB-KBB, in their main office in Houston from mid-April, 1981.

Upon joining the ONWI project office in mid-June, 1982; he determined that the design concepts provided by Battelle would not comply with the written specifications of the executed federal contract. He also determined that essential geological information such as explosive, and toxic gas occurrence data were lacking. Those geological data are essential for properly starting the contracted for design process. Petitioner wrote PBQD/PB-KBB's management that the design process could not be started without those vital geological data.

PBQD/PB-KBB had never designed such facilities in subsurface salt formations or in any formations containing pressurized pockets of explosive and toxic gases. They did not have the knowhow. There are many instances of fatal gas outbursts in salt formations and the contracted for facilities could not be designed without the essential gas occurrence data.

When petitioner was bringing those issues of design and lack of data problems;

Siegfried Poppen and J. Kanopka of Canada, who were in the project office for the shaft design purpose, told PBQD/PB-KBB management that they are experts in such facilities design and only thing need to be done was to do some air cooling, which would take care of the explosive methane and toxic hydrogen sulfide gas occurrence problems. They further told PBQD/PB-KBB that plaintiff should be fired for raising those issues and his tasks should be assigned to them. As a result of Canadians' presentation to PBQD/PB-KBB they were assigned the subsurface design portion of PBQD/PB-KBB's contractual rights and obligations. The partial assignment was for the design of underground openings in which petitioner was working.

PBQD/PB-KBB, as a party to the aforesaid contract, manifested intention to make a present transfer of a part of their rights to Thyssen (Canada), who has accepted the assignment. The partial assignment was thus completed as per Restatement Two of Contract § 324.

The obligor (Battelle/DOE) had knowledge of the assignment which the assignees had already informed. The obligor had accepted the Canadian assignees' performances and made payment to them in return for their work.

The Canadians initially came here to design the shaft. The additional assigned tasks were not in the original subcontract where the Canadians were working.

Petitioner was unaware of the exchanges and about the partial assignment of contract to the Canadians, which were going on behind his back. PB-KBB never truthfully answered interrogatories and evaded the whole truth behind petitioner's firing and about the assignment of his tasks to the Canadians. He was unaware of Canadians' conspiracy to to get him fired and take over his tasks until about November, 1994.

Accordingly, as per the Canadian's conspiratorial representations, PBQD/PB-KBB fired plaintiff from the project office in late July, 1982.

Petitioner then wrote a memo on August 6, 1982, outlining the problems of desgining gassy mine facilities containing pockets of deadly explosive gases. In retaliation, PB-KBB fired him on August 18, 1982.

After he was fired, petitioner filed a complaint with the MSHA, under the Mine Safety Act of 1977. In the meantime PB-KBB contacted plaintiff in September, 1982, for hiring him back.

MSHA told petitioner that he would not be covered under the Mine Safety Act, but told the DOE informing that PBQD/PB-KBB was designing very unsafe facilities for the Nuclear Waste Isolation. MSHA forwarded petitioner's August 6, 1982 memo to the DOE, while expressing their concerns about PBQD/PB-KBB's unsafe designs. DOE then forwarded MSHA's communications with petitioner's memo to Battelle, who in turn, talked to

PBQD/PB-KBB on or about last week of September 29, 1982. PBQD/PB-KBB's initial submission of preliminary design was due on or about October 14, 1982, which Battelle refused to accept as a result of petitioner's complaint to MSHA. As a retaliation for petitioner's informing the MSHA about their fraudulent designs, PB-KBB refused to hire petitioner back.

Petitioner then filed his second complaint to MSHA because of PB-KBB's retaliation in refusing to rehire him back. MSHA again denied petitioner coverage of the Mine Safety Act.

However, as a result of petitioner's complaint to the MSHA, Battelle-PBQD/PB-KBB contract was amended and the schedules for the contract also changed.

Petitioner then filed his complaint to the Federal Mine Safety Review Commission, which also denied plaintiff coverage under the Mine Saftey Act.

Defendant PB-KBB admitted to the Federal Mine Safety Review Commission (FMSRC) proceeding in 1984 that they submitted false bids to Battelle/DOE prior to receiving their contract, and that they did not have the claimed qualification and experience to perform the contracted for tasks. They also stated that they did not care what the Government does with their performed designs. The Administrative Law Judge, Kennedy, told PB-KBB that it would be illegal for them to design unsafe facilities. However, PB-KBB was defiant on Judge Kennedy's

statements.

PB-KBB (its Vice President Jack Schmedemann, representing the company) also stated to the FMSRC that petitioner was fired for complaining about their fraudulent and dangerous designs. PB-KBB also stated that they had vacancies for someone like petitioner in their company, but they were not looking for him, they could not hire him and were looking for someone else to do their work.

However, after stating to the FMSRC that PBQD/PB-KBB did not have the claimed qualifications and experience to design the contracted for facilities, after stating that they submitted false claims as to their qualifications and experience in their bidding documents, they repeatedly signed more and more Government contracts with Battelle to design more facilities. They also repeatedly signed additional amended Gvernment contracts, and repeately submitted false claims to the United States and collected more and more Government money. The submission of false claims continued until 1988, when the Congress cut off the funds for the projects. Needless to say, PBQD/PB-KBB never submitted a single task in six years which complied with the specifications of the contract. Defendants knew all along that they were submitting false claims to the United States, and knowingly submitted false claims from 1982 through 1988.

In the mean time petitioner was unemployed because PBQD/PB-KBB repeatedly

retalited against him by stating to other potential employers that petitioner refused to participate in their fraudulent/and criminal enterprise and he was fired for that reason. Petitioner was told by MSHA, D'Appollonia Engineers, DOE and U.S. Air Force that PB-KBB told them that he was fired for not performing a task. Battelle also retaliated against petitioner by refusing to hire him for not participating in their fraudulent and criminal enterprise and for complaining to the MSHA.

Petitioner then filed his suit in Texas state court in 1987 for wrongful termination. PB-KBB denied to the Texas jury what they admitted to the FMSRC. They denied firing petitioner this time. They denied about submitting fraudulent bids to the United States which they admitted in the FMSRC proceedings, and which are on records. They committed repeated perjury to the Texas jury and changed their defense to suit that jurisdiction's requirements. They stated that petitioner was laid off for lack of work and their design was safe.

They were untruthful, evasive and never told the whole truth during the discoveries and during trial. For example, they never stated that a part of their contractual rights were assigned to the Canadians after firing plaintiff. They intentionally misled the Texas jury by stating that their Pakistani employee, Mahmud Mirza, was designing the facilities, when, in fact, those were designed by the Canadians.

They obtained the judgment in the Texas court by disvowing, denying what they have admitted to the FMSRC, which are in the records. They obtained the judgment by frauds on the court. Their two attorneys repeatedly committed perjuries and submitted false affidavits to the Texas state court and the U.S. district court in the instant case. All of these are in the records.

Their two attorneys, Paul Boulon and Anson Phipps, also lied to this court. Petitioner has records which he can produce and prove these facts.

PB-KBB's most of the fraudulent, false and perjurious testimonies presented during the Texas state court trial are excludable under the doctrine of estoppel. PB-KBB was ESTOPPED to dispute, contradict and deny its prior testimonies given to the FMSRC.

Petitioner brought the instant case in Houston district court against PBQD/PB-KBB and Battelle under the False Claims Act, 31 U.S.C. 31 U.S.C. 3730 (b)(1) to collect money for the United States and for himself under the Qui Tam provision. These claims and issues were never litigated before and could not have been brought during the Texas lawsuit as the condition precedent for such a suit was not satisfied, i.e. the fraudulent design contracts were still in progress at that time. The case for fraudulent designs could not be filed and proven as long as they were working on those. Besides, PBQD/PB-KBB and their two attorneys have proven track records of

frauds, perjuries and misrepresentations.

Petitioner also brought the instant case under 31 U.S.C. 3730(h) to collect for his damages caused by the defendants, for unlawfully firing him, for refusal to hire him back, for defaming him, for blackballing him, for causing special damages to him and for causing mental distress to him.

PBQD/PB-KBB and their two attorneys not only perpetrated frauds on the courts, they have caused collapse of this country's nuclear waste isolation projects where the Government have spent more than $25 billion. They defrauded the Government for more than six years, 1982 through 1988, and have not produce a single piece of paper complying with the contract specifications. They caused damages to the petitioner and ruined his career and ruin his family in the process, too.

PB-KBB and its two attorneys acted in such a daring manner, submitted its motion under FRCP 12(b)(6) and under FRCP 56(b), as if their prior testimonies, which are on records, did not matter. Petitioner submitted motions for sanctions under FRCP 11 and under FRCP 56(g), which were denied by the district court below.

The original case dealt only with the Texas design sites and the designs in made for other states were never litigated.

The instant case deals with contracts

which was negotiated in Ohio for performing in Utah, in Texas, in Louisiana and in Mississippi.

The instant case deals with an indispensable party, Canadian domiciles, who as partial assignee and subcontractor of PBQD/PB-KBB, conspired to defraud the United States, did the fraudulent design performance under a federal contract.

The same indispensable party, who conspired to have petitioner fired and who had taken over his job assignments. These facts are the newly discovered evidence. Petitioner learnt about these from Harry Gleser, who was in the ONWI project office and who told petitioner about these in November, 1994.

The courts below dismissed plaintiff's complaint by citing res judicata due to the Texas court litigations. Petitioner believes that res judicata was improperly used, and the courts' rulings do not satisfy the requirements of Restatement Second of Judgement.

Petitioner learnt about PBQD/PB-KBB's partial assignment of contracts to the Canadians in late 1994, and this motion was brought under FRCP 60 (b)(2), 60(b)(3) and 60(b)(4), which were denied. Petitioner then brought additional evidence under FRCP 59, which was also denied.

The court below summarily dismissed petitioner's appeal.

REASONS FOR GRANTING WRIT
Summary of Arguments

The case involves summary decisions of the courts below where, petitioner believes, a number of errors were made. The instant judgment, entered by applying the doctrine of res judicata, is void as the Harris County Court which entered the original judgment, did not have territorial jurisdiction to try a case where frauds and tortious acts perpetrated in Utah, in Louisiana and in Mississippi by an indispensable party who is Canadian domiciled, under a contract which is executed in Ohio.

These decisions do not comply with the U.S. Constitutional requirements and the long standing holdings of this court and those of other circuits.

Besides, the respondents are unscrupulous and they have knowingly caused material damages to this country's nuclear waste isolation projects. If the rulings of the courts below are allowed to stand, a series misconducts by a group of cheaters inside the courts and outside, over a number of years, will remain unaddressed. In that case other wrongdoers will also get encouraged in fraudulent activities.

A Number of Important Questions of First Impression Before This Court

Arguments under Question No. 1

Paul was unable to fully and fairly present his State court case.

In this holding, the court below presumed that petitioner should have been aware of PB-KBB's frauds on the court and he should have brought those in the Texas state court. This presumption is inconsistent with the facts of the case.

The court below reached its conclusion without any factual basis. It refused to hear any oral argument, which the petitioner requested which could have clarified the issue.

Petitioner was not living in Houston since July 5, 1988, and was not near where his attorney was living. The ltigation papers were with his attorney and in the court. So the petitioner could not actively participate in the litigation process from California. He did not realize that PB-KBB would be allowed to deny unlawfully in the State court what it had admitted to the earlier tribunals.

Petitioner was living in California at the time defendant committed the perjuries and used fraudulent tactics in the Texas court lawsuit. Also the trial took place on an unscheduled date. There was another trial which was to take place on that date, but the parties to that case either settled or rescheduled their calender. As there was a gap in the court's calender, petitioner's case was started by his ex-attorney during that gap. Petitioner was in Bishop, California, when his ex-attorney's wife called informing that his case was already in progress in Houston. By the

time petitioner went to the court in Houston, most of the hearing was over. So petitioner did not even hear most of the fraudulent and perjurious testimonies presented by PB-KBB in front of the Jury. So he could not have challenged something in front of the jury which he did not or could not hear. Almost all of the PB-KBB's presentations contradicted their prior testimonies to the FMSRC.

Besides, petitioner did not have any litigation papers or earlier courts records with him at that time to present to the Texas courts.

Petitioner was not even aware of the fraudulent practices are in progress in the state court until he filed the instant lawsuit and received litigation materials in California from his ex-attorney in Texas. Petitioner did not even suspect that PB-KBB and its two attorneys were presenting evidence in the state court by perjurying, denying, contradicting and disputing their prior testimonies to the Federal Mine Safety Review Commission's proceedings, which are in the records.

PB-KBB stated to the FMSRC that petitioner was fired for complaining about their fraudulent and dangerous designs. PB-KBB also stated that they had vacancies for someone like petitioner in their company, but they were not looking for him. PB-KBB also stated that they could not rehire petitioner because of his complaints about the fraudulent designs and were looking for someone else to do their work.

But in the Texas State court PB-KBB told the Jury that petitioner was laid off for lack of work. PB-KBB thus illegally obtained the State court judgment by presenting false and perjurious testimonies to the jury when the petitioner was not in the Court. Petitioner was in California at the time and was travelling to Houston to attend the trial.

Besides, most of PB-KBB's testimonies presented in the Texas court are not admissible in that state because these are illegal and excludable by the rule of evidence in that state. PB-KBB was estopped to deny, contradict and dispute their prior testimonies, which are on records.

Besides, in Texas, the laws of evidence prohibits, presenting such testimonies disputing, denying and contradicting its prior testimonies given to another tribunal; Texas Title 55 (Evidence, Article 3713, Rule 37, note 12 through 20). These evidences are also excludable under Texas Rules of Civil Procedure, as well. see Tex. Rule 169, Pre Trial Procedure, also Rule 184, Evidence.

So the Texas judgment was VOID as it was obtained illegally, by violating that state's own codes, laws and regulations.

Further, the holdings of the court below also do not comply with the requirements of Rule 60(b)(3), which states,

"On motion and upon such terms as

> are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconducts of an adverse party.

The issue of extrinsic and intrinsic Frauds, which the court below apparently relied on, have been eliminated under FRCP 60(b) Ruling procedures.

The court below obviously erred on this issue here.

Arguments under Question No. 2.

The absent party, the Canadians, would be liable to petitioner as they conspired to have him fired and took over his job functions. PB-KBB took advantage of their absence in the State court by stating that petitioner was laid off for lack of work, when the work was assigned to the Canadians. Petitioner was thus adversely impacted because of their absence.

The court erred again on factual ground here. The instant case was filed on contract and contract laws governs. Defendants committed frauds and torts after entering the contract. The court's cited case laws are inapplicable in the instant case.

The Canadians are an indispensable party

Due to the perjury and fraudulent litigation tactics of PB-KBB, petitioner did not learn about the Canadians' conspiracy to have him fired at the time of state court trial.

PB-KBB claimed in the state court that plaintiff was laid off due to lack of work after assigning his job functions to the Candians. PB-KBB could not commit frauds and perjuries in the state court if the Canadians were brought in the trial. Further, PB-KBB misrepresented that Pakistani, Mahmud Mirza, was designing the facility when, in fact, the Canadians were designing. These two misrepresentations have adversely impacted plaintiff's interests.

The court below should have allowed oral testimonies prior to dismissing the appeal arbitrarily.

In the instant case, the Canadians are an idispensable party for the above reasons and for a different reason. PBQD/PB-KBB, as a party to the aforesaid contract, assigned of a part of their rights and obligations to Thyssen (Canada), who has accepted the assignment.

Due to the partial assignment of PBQD/PB-KBB's contract to the Canadians, they become an indispensable party in proceeding as per RESTATEMENT (Second) of CONTRACT § 326, which states,

> "If the obligor has not contracted to perform separately the assigned part of a right, no legal proceeding can be maintained by the assignor or

assignee against the obligor over his objection, unless all persons entitled to the promised performance are joined in the proceeding, or unless joinder is not feasible and it is equitable to proceed without joinder."

In the instant case petitioner represent the obligor. The Canadians, being partial assignee, are indispensable party in the instant case. Without them being made a party, the original judgment as well as the instant judgment, both are void.

As there is an indispensable party in the instant case, who are Canadian domicile, the instant case could not be brought in the Harris County court.

In view of the above, res judicata was erroneously applied in the instant case and petitioner's claims were unalwfully extinguished.

Arguments on Question No. 2(a)

Both of the original judgment as well as the instant judgment, both, are void. Hence these judgments are subject to collateral and direct challenge.

There are two separate issues here as there are two separate cases. The first isssue is whether the original state court judgment is valid. The second issue is whether instant case is res judicata when one of the indispensible party in this litigation is a Canadian domicile, even if the state court

judgment cannot be collaterally attacked.

When an indispensable party in the litigation was left out, the judgement entered is void and is subject to collateral attack. When it is obvious that bringing that party in the litigation, the state court could not try the case, judgment entered in the state court is subject to collateral attack.

Further, res judicata cannot be applied arbitrarily when it is clear from the evidence presented that the instant case could not have been brought in the state court. The judgment of the district court is directly attacked in this appeal.

As per Article III, Section 2 of the United States constitution, one of the defendants, an indispensable party, being Canadian domicile, the instant case cannot be brought in the Texas state court. Hence the judgment entered in the instant case, by giving full faith and credit to a void state court judgment, and by applying the doctrine of res judicata, is void.

When a judgment is void, the courts below, under FRCP 60(b)(4) motion, should have vacated the judgment. The courts did not have the discretion to upheld a void judgment, which is a legal nullity.

Arguments under Question No. 3.

Petitioner briefed the issue on appeal and did not abandon it.

The followings are the facts:

The court below misapprehended the facts of the case, entered summary judgment and made several factual and legal errors.

Petitioner briefed this issue on appeal in his statement of the Case, in his Issue Nos. 2, 3, and in his Issue No. 5, and in his arguments made under those issues. The issue was not abandoned.

Further, petitioner brought the instant case against the defendants for defrauding the United States under contracts. However, the court below cited case laws which are not governed by contract laws and are not applicable in the instant case.

The issue have been repeatedly briefed in the district court: e.g Paul's pleading of December 9, 1993, [CIV ACT H-92-2792] p. 18 stated,

> "---The State court do not have the jurisdiction to try false claims act related actions. Besides the case at bar involves defendants performance of field services in Mississippi, in Texas and in Utah, under a federal contract, requiring compliance of a number of federal statutes. The prime contractor Battelle is from Ohio. The contract is for the DOE with headquarters in Washington, D.C., and is operated from it's office in Chicago, Ill. and from Columbus, Ohio. Defendant Parsons and Brinkerhoff is based on New York City, and its officers based on that

> location made the false claims to the United States in 1981, while securing the contract. Defendant K.B.B. GmbH is based in Germany, and is owned by two large Oil and Oil Service Companies based in that country. The policy of its operation is conducted from Germany. From this fact, the court can see that Texas state court do not have the jurisdiction to try this case. Hence defendant's argument under this section is totally misplaced".

Further, petitioner submitted to the district court "LETTER CONTRACT NO. E 512-08900, A-E SERVICE FOR AN EXPLORATORY SHAFT FACILITY----" on November 2, 1993, as his Exhibit-1, and he repeatedly cited on it.

Again, petitioner pleaded on pp. 8-9 of his response on November 8, 1993, mentioned defendants' design reports on sites located in 4 states:

1. REPORT ON GULF INTERIOR REGION: ONWI-496.

2. REPORT ON PARADOX BASIN : ONWI-497.

3. REPORT ON PERMIAN BASIN :ONWI-498.

4. 2nd REPORT ON GULF INTERIOR REGION- To plaintiff's knowledge, never written."

Petitioner also submitted ONWI-498 to the district court on November 2, 1993 as his Exhibit 5(a).

Petitioner then submitted ONWI-496 and

ONWI-497 as his Exhibit No 5(c) and 5(d) to the district along with his Rule 60(b) motion on-5/17/95.

Petitioner again brought this issue in the district court along with his Rule 59 motion.

Petitioner then brought this issue in the appeals court in his "STATEMENT OF THE CASE" which stated,

> "Battelle Memorial Institute invited a bid on behalf of the U.S. Department of Energy (DOE), Office of the Nuclear Waste Isolation (ONWI), in 1981, for designing 1/2 mile deep underground exploratory shaft facilities in Utah, in Texas, in Louisiana and in Mississippi."

On appeal, petitioner's Issue No. 3 stated,

> "Whether Harris County court has the authority to try a case arose under the False Claims Act, where intentional torts and frauds have been perpetrated against the United States in Utah, in Texas, in Louisiana and Mississippi, by people who are undocumented foreign citizens?"

In argument on this issue, petitioner stated,

> "As per Gray V. American Radiator & Standard Sanitary Corp, 22 Ill 2d 432, 176 NE 2d (1961), and as per Murphy v. Erwin-Wassy, Inc., 460 F.

2d 661, 664 (1st Cir. 1972) the jurisdiction ti try the case of intentional torts liabilities in those counties where the victims would be affected. Hence the intentional torts or criminal mine design would not affect the people of Harris County, but would affect the people of the seven counties spreading over four states where the Federal facility sites are located. So the jurisdiction to try the instant case would be in those seven counties and not in the Harris County, Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 24 L.Ed. 565 (1877). This would be the case if the perpetrators were all U.S. domiciles".

"But when the perpetrators were foreign citizens, domiciled in Canada and in other countries, the Harris County court would lack the in personam jurisdiction over the parties to try the case and the instant case can only be tried in a U.S. court."

"Further, the solicitation, bidding and the execution of the Battelle-PBQD/PB-KBB contracts at issue were done from Columbus, Ohio. Under Burger King v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed 2d. 578, the jurisdiction to try the instant case will be in Ohio. Again, Harris county district court could not try the instant case."

Similar arguments were made under Issue No. 5 on appeal.

Petitioner, again repeatedly brief this issue in his reply brief on 1/16/96.

From these aforesaid cited facts, the court can see that petitioner did not abandon the issue on appeal.

From the above, petitioner contends that the issue of territorial jurisdiction was well pleaded in the district court and in the appeals court, the court below erred in its ruling, and this court should grant certiorari to the court below.

Further, the court below erred in its conclusion on this issue. The summary judgment was entered by applying the doctrine of res judicata. The court below should have looked at whether the instant case could have been brought in the Texas state court, or the Texas courts have ever tried such a case in contract. Obviously, this could not be done. Hence, judgment of the court below is void and this court should vacate it.

Arguments under Issue No. 4

The holdings of the court below do not meet the U.S. Constitutional requirements and is, therefore, void.

The court below is clearly made error on this holding. Texas constitutional clause cannot authorize it to exercise jurisdiction over those causes of action which arose in Utah, in Louisiana and in Mississippi, disregarding the U.S. constitutional requirements.

Article 5, § 8 of Texas Constitution states,

> "District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction."
>
> "The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law"

There is not a single case listed under Tex. Const. art. 5, § 8, where the court of that state adjudicated the issues which arose in Utah, in Louisiaba and in Mississippi.

Further, this holding will not meet the requirements of Restatement of Judgment (Second) § 92, which states stipulates the Requisite of a Valid Judgment.

> A Judgment is valid if
>
> (a) the state in which it is rendered has jurisdiction to act judicially in the case; and
>
> (b) a reasonable method of notification is employed and a

reasonable opportunity to be heard is afforded to persons affected; and

(c) the judgment is rendered by a competent court; and

(d) there is compliance with such requirements of the state of rendition as are necessary for the valid exercise of power by the court.

In the note (e) under the above Restatement, it is stated,

(e). "Necessity of judicial jurisdiction. A judgment is valid only if the state where the judgment was rendered had jurisdiction, as defined in § 24, to act in the case".

In the note (f) under the above Restatement, it is stated,

(f). "Exercise of judicial jurisdiction by state restricted by federal constitution.

'----- Thus, a state of the United States may not exercise jurisdiction through its courts when to do so constitutes a violation of any clause of the Constitution of the United States as interpreted by the Supreme Court.' "

This court in Hall v. Lanning, 91 U.S. 160. 23 L.Ed 271, hold that

the jurisdiction of a foreign court over the person or the subject-matter embraced in the judgment or decree of

such court is always open to inquiry, and in that respect, the court of another state is to be regarded as foreign court.

The holding of the court below does not meet the requirements of this case law.

Further, Restatement of Judgments (Second) § 103, states on the Limitations on Full Faith and Credit

> "A judgment rendered in one state of the United States need not be recognized or enforced in a sister State if such recognition or enforcement is not required by the national policy of full faith and credit because it would involve an improper interference with the important interests of the sister State."

The holding of court below will not comply with this provision of the Restatement.

Also the same holding will not comply with § 105 and § 110 of the same Restatement of Judgments (Second).

The court should therefore vacate the judgment of the court below.

Arguments underon Question No. 5

By applying the doctrine of res judicata petitioner's claims in the instant case could not be extinguished. The followings are the facts.

Petitioner's original case was for wrongful discharge in a Texas design case under a 1982 contract in the Texas state court.

The original case was:

Dilip K. Paul v. PB-KBB Inc.

The instant is for defrauding the United States in the U.S. District court.

U.S. ex rel. Dilip K. Paul
v.

Parsons, Brinkerhoff, Quade & Douglas Inc., PB-KBB Inc. and Battelle Memorial Institute.

The instant case is over a contract which reqires performance in 4 different states.

That contract was amended at least 4/5 times in response to petitioner's lawsuits. The locations and sites and other contract data changed at least 4/5 times over the 6/7 years period.

From these facts, the court can see that the court below erred in holding that petitioners claims are res judicata, by applying Restatement of Judgment (Second).

A judgment on the Texas portion of a contract cannot extinguish petitioner's claims arose in Utah, in Mississippi and in Louisiana. Further res judicata in Texas is governed by Texas law. So Texas law cannot be used to extinguish

petitioner's claims arose in other jurisdictions.

Further, the instant case cannot be brought and tried in a Texas state court. Petitioner looked at the entire Texas Digest but did not find a single case where False Claims related cases were tried. Petitioner also did not find a single case which parallel to the instant case and which was tried Texas. Obviously, this cannot be done without violating the U.S. Constitution.

Under such a circumstances, it was erroneous for the courts below to held that petitioners claims are res judicata. The doctrine judicata cannot be applied if both of the original case and the instant case cannot be tried by the same court. Further, causes of both of the cases must be ripe for action when the initial case was brought in. That is also not the case here.

Obviously it was erroneous for the courts below on this holding.

CONCLUSIONS

There are a number of material errors made by the courts below. The False Claims Act requires petitioner to provide only preponderance of evidence. The court below repeatedly insisted on clear and convincing evidence in a summary proceeding.

The Congress enacted the False Claims Act to deal with this type of entities. The holdings of the courts below will

encourage cheaters.

The rulings of the court below will not comply with requirements of U.S. Constitution, this court's rulings and rulings of other circuits.

A Judgment is void when the court rendering it lacks subject matter jurisdiction, territorial jurisdiction, in personam jurisdiction over a party, lacks the authority to pass the judgment, and if the procedures adpoted do not comply with the due process of law.

Petitioner has shown repeatedly here in above that the judgment of the court below is void in all of the aforesaid counts, and this court must not allow it to stand.

For the Forgoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted

Dilip K. Paul

Dilip K. Paul
Petitioner, Pro Se

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APPENDIX 1.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20733
Summary Calendar

DILIP KUMAR PAUL, ET AL.,
Plaintiffs,

DILIP KUMAR PAUL,
Plaintiff-Appellant,

versus

PARSONS, BRINKERHOFF, QUADE, & DOUGLAS; PB-KBB, INC., BATTELLE MEMORIAL INST.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas
USDC No. CA-H-92-2429

Before JOLLY, JONES, and STEWART, Circuit Judges.
PER CURIAM:*

Dilip Kumar Paul has appealed the denial of his Fed. R. Civ. P. 60(b) motion for

*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

relief from the district court's Judgment dismissing his qui tam action under the False Claims Act, 31 U.S.C. §§ 3730, et seq. Paul contends that the state court's judgment, which this court previously held, precluded consideration of his substantive claims under the doctrine of res judicata, is void because it was obtained by means of perjury and fraudulent litigation tactics on the part of the defendants. Even if its assumed that Paul can establish by clear and convincing evidence that the defense was predicated upon factually false testimony, Paul has failed to demonstrate that he was prevented from fully and fairly presenting his state court case. Therefore, Paul has failed to show that the district court abused its discretion in denying his motion under Rule 60(b)(3) because of "fraud, misrepresentation, or other misconduct of an adverse party." Longden v. Sunderman, 979 F.2d 1095, 1103 (5th Cir. 1992).

Paul contends that the state court judgment was void because essential parties could not be joined. Paul does not explain why the interests of the absent parties were negatively impacted because they were not joined as defendants in the state court action and he does not explain how the absent parties could have been liable to him under applicable state law. see Vondy v. Comm'rs Court of Uvalde County, 620 S.W.2d 104, 106-07 (Tex. 1981); Tex R. Civ. P. 39. Even if the absent parties were "indispensable," their absence did not create a jurisdictional defect and does not provide a basis for collaterally

challenging the state court's judgment. See Judwin Properties, Inc. v. U.S. Fire Ins. Co., 973 F.2d 432, 434-35 (5th Cir. 1992); United States v. O'Neil, 709 F.2d 361, 371 (5th Cir. 1983); see also Cox v. Johnson, 638 S.W.2d 867 (Tex. 1982).

Paul contends that the Texas state courts were without jurisdiction to resolve legal issues involving claims that arose in other jurisdictions. Paul's argument goes to the subject-matter jurisdiction of the state court to adjudicate claims arising in other jurisdictions. While the place where the alleged tort occurred may be pertinent to personal jurisdiction, venue, or the question of which forum's law should be applied, the fact that a claim arose in another jurisdiction and may have impacted that jurisdiction more directly is not determinative of the court's authority to render a judgment. See Tex. Const. art. 5, § 8.

Paul also argued in the district court that the state court lacked personal jurisdiction because the contracts at issue were negotiated and executed in Ohio "for performing work in Utah, in Texas, in Louisiana and in Mississippi.....". Paul has abandoned this issue by failing to brief it on appeal. See Brinkman v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987)

Paul argues that his claims against parties who were not named in the state court suit are not res judicata. This court has already found that there was

privity among all of the defendants and that the claims against them are res judicata. Paul argues that the district court should have granted his Rule 60(b) motion based upon newly discovered evidence. He does not identify in his argument what the newly discovered evidence showed or how it would have affected the district court's judgment.

Paul argues that his FCA claims could not have been barred under the doctrine of collateral estoppel. Paul's complaint was dismissed under the doctrine of res judicata. Paul argues that a magistrate judge cannot rule on matters materially affecting his interests without his consent. The magistrate judge did not rule on Paul's Rule 60(b) motion. Paul argues that he should have had an opportunity to conduct discovery. The lack of an opportunity for discovery does not involve the sort of compelling circumstance that might provide a basis for relief under Rule 60(b)(6).

Paul has not shown that the district court abused its discretion in denying his Rule 60(b) motion for relief from the judgment. His appeal is frivolous and is DISMISSED. See Howard v. King 707 F.2d 215, 219-20 (5th Cir. 1983) 5th Cir. R. 42.2. Paul is cautioned that any additional frivolous appeals filed by him will invite imposition of sanctions. To avoid sanctions, Paul is further cautioned to review any pending appeals to ensure that they do not raise arguments that are frivolous because they have been previously decided by this court.

APPEAL DISMISSED, SANCTIONS WARNING ISSUED.

Appendix 2.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA ex rel. DILIP KUMAR PAUL	§	
Plaintiff,	§	
v.	§	CA NO H-92-2429 (c/w CA NO H.92-2792)
PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC., and P.B.-K.B.B	§	
Defendant.	§	

ORDER

Pending before the Court is the Motion Under Rule 60(b) of the Federal Rules of Civil Procedure (Document #60) filed by plaintiff Dilip Kumar Paul ("Paul"). Having considered the motion, submissions, and applicable law, the court determines that the motion should be denied. Therefore, based on the foregoing, the Court hereby

ORDERS that the Motion Under Rule 60(b) is DENIED.

SIGNED at Houston, Texas, on this 9 day of August, 1995.

/s/ David Hittner
DAVID HITTNER
United States District Judge

Appendix 3.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA ex rel. DILIP KUMAR PAUL	§	
Plaintiff,	§	
	§	CA NO H-92-2429
v.	§	(c/w CA NO H.92-2792)
PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC., and P.B.-K.B.B	§	
Defendant.	§	

ORDER

Pending before the Court is the Motion Under Rule 59 of the Federal Rules of Civil Procedure (Document #66) filed by plaintiff Dilip Kumar Paul ("Paul"). Having considered the motion, submissions, and applicable law, the court determines that the motion should be denied. Therefore, based on the foregoing, the Court hereby

ORDERS that the Motion Under Rule 60(b) is DENIED.

SIGNED at Houston, Texas, on this 6 day of September, 1995.

/s/ David Hittner
DAVID HITTNER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA) ex rel. DILIP KUMAR PAUL,	)	CIVIL ACTION
Plaintiff,	)	No. H-92-2429
v.	)	(Consolidated with Civil Action
PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. and PB-KBB,	)	No. H-92-2792
Defendants.	)	

ORDER

Pending before the Court is the Motion to Dismiss, or in the alternative, motion for Summary Judgment and Renewal of Request for Sanctions filed by defendants Parsons, Brinkerhoff, Quade & Douglas, Inc. (PBQ&D). Having considered the motion, submissions, and the applicable law, the Court determines that the motion to dismiss should be granted and request for sanctions denied. The Court further determines that defendant Battelle Memorial Institute (BMI) should be dismissed sua sponte for the same reasons stated herein.[1]

Plaintiff Dilip Kumar Paul (Paul) initiated this cause of action pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. §3730, *et seq.*, against PBQ&D, and PB-KBB. Although the False Claims Act provides the United States

[1] A district court may dismiss a case upon its own motion. ------ *v. Brazos County*, 981 F.2d 237, 242-43 (5th Cir.)43

Government the opportunity to intervene in a qui tam suit brought under the Act, the United States elected not to intervene in this case. See Document 15. In the complaint, Paul alleges that the defendants "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the Government...a false or fraudulent claim for payment or approval." 31 U.S.C. §3726(1). A similar cause of action brought against BMI was consolidated with the instant case.

Paul was first employed by PB-KBB, an engineering firm, in June 1981. In June 1982, PB-KBB and PBQ&D formed a joint venture (PB/PB-KBB) to function as subcontractor to BMI. Since 1978 BMI has been responsible for the management of the United States Department of Energy's (DOE) National Waste Terminal Storage Program. PB/PB-KBB was employed by BMI to design an exploratory shaft for a nuclear waste storage project for the DOE. On October 7, 1982, the DOE approved the subcontract and on November 23, 1985, BMI assigned the subcontract to the DOE. As a result of the assignment, PB/PB-KBB submitted all of its claims for payment directly to the DOE. It is the submission of these claims for payment by PB/PB-KBB to DOE that Paul alleges were fraudulent and form the basis of his False Claims Act causes of action.

When the joint venture was formed in June 1982, Paul was selected as a mining engineer on the project. Paul was instructed by PB- KBB to perform a trade-off ventilation study. *Paul v. PB-KBB, Inc.*, 801 S.W. 2d 229 (Tex. App.--Houston [14th Dist.] (1990), writ denied).[2] By mid-July 1982, Paul had not completed the trade-off study and was transferred to the "Infrastructure" division of PB-KBB. During the first part of August 1982, Paul was discharged.

[2]This case refers to a state court suit filed by Paul against PB- KBB.

Following his dismissal, Paul filed suit against PB-KBB in Texas state court alleging that he was wrongfully discharged for his unwillingness to commit an illegal act. *Id.*[3] Paul claimed that "the preliminary study called for one shaft rather than two and [the preliminary study] design 'could've [sic] killed people.'" *Id.* Paul argued that he was fired for his objections to the project. *Id.* After a jury verdict for Paul's employer was affirmed by the Texas Court of Appeals, Paul filed this complaint.

PBQ&D and PB-KBB contended that this case should be dismissed on the following basis: (1) *res judicata*; (2) the lack of federal court jurisdiction; (3) the failure of Paul to allege "fraud" and "guilty intent" under the False Clams Act; (4) the failure of Paul to state a cause of action for retaliation under the False Claims Act; and the expiration of the statute of limitations. The Court finds that because Paul could have raised the False Claims Act allegations contained in the complaint when he filed the prior state action, the principle of res judicata supports dismissal of his complaint in this action.

When a decision is rendered on the merits of a case by a court of competent jurisdiction, the judgment is conclusive for the parties and their privies "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Nevada v. United States*, 443 U.S. 109, 129-30 (1983).

As the prior lawsuit was brought in Texas state court, this court will give full faith and credit to the state court judgment pursuant to 28 U.S.C. §1738, and will apply in its evaluation of the effect res judicata has on the complaint. *Hoque v. Royse City, Tex.*, 939 F.2d 1249, 1252 (5th Cir. 1991).

---

[3]Paul has filed two other causes of action against PB-KBB. See Document #30 at 3-4.vi

In order for res judicata to apply, four requirements must be met: (1) the parties must be identical in both suits; (2) the prior judgment must have been rendered by a court of competent jurisdiction on the merits; and (4) the same cause of action must be involved in both cases. *Eubanks v. F.D.I.C.*, 997 F.2d 166, 169 (5th Cir. 1992). In this case, the second and third requirements have been met as the prior lawsuit was adjudicated by the state court and affirmed by the Texas Court of Appeals. See *Paul, supra* at 229.

The first and fourth requirements for the application of res judicata, that "the parties...be identical in both suits," and that "the same cause of action...be involved in both cases," are the two issues for consideration in review of the defendants' motion to dismiss. *Eubanks, supra* at 169.

Pursuant to Texas law, the first requirement for the application of res judicata to bar a subsequent cause of action, the "identity of parties" test, does not demand strict identity. Rather, parties in the subsequent action are considered "identical" to parties in the previous action if the non-parties are in privity with the earlier parties. *Getty Oil v. Insurance Co. of N. America*, 845 S.W.2d 794, 800 (Tex. 1992) (stating that there is no general definition of privity that can be automatically applied in all *res judicata* cases; the circumstances of each case must be examined). Having examined the relationship between PBQ&D and PB-KBB, this court finds the requisite privity to bar this complaint. In addition, the court finds privity between BMI the general contractor, and PBQ&D and PB-KBB, the subcontractors.

PBQ&D has asserted two related grounds to support its privity argument with PB-KBB. First, PBQ&D argues that its liability is derivative of PB-KBB's, and therefore the False Claims Act cause of action against PBQ&D should be barred. PBQ&D cites Texas law which holds that "where the rights and liabilities of a party are derivative, a judgment

derived may be set up as a bar in the second suit." *Lemon v. Spann*, 633 S.W.2d 568, 570 (Tex. App.--Texarkana 1982, writ ref'd n.r.e.) .

PBQ&D's second argument to establish privity centers on the fact that PBQ&D was one of the joint venturers, along with PB-KBB, to which BMI subcontracted the design of the exploratory shaft facility. The gravamen of Paul's complaint is that PBQ&D and PB- KBB acted together to defraud the government. Paul continually refers to PBQ&D, BMI, and PB-KBB simply as "defendants" when alleging wrongdoing. Paul's allegations against the defendants are virtually identical. Thus, PBQ&D maintains that privity exists between the defendants and *res judicata* bars Paul's complaint.

PBQ&D also claims that because it is joined as a defendant with PB-KBB in the complaint, it is in a vicarious relationship with PB-KBB. In situations of vicarious liability, a judgment for one of the parties in the vicarious relationship bars a later action against the other. Thus, PBQ&D maintains that Paul's complaint against it should be dismissed as a result of PB-KBB's success in the state court action. *Soto v. Phillips,* 836 S.W.2d 266, 269 (Tex. app.--San Antonio 1992) writ denied (citing Restatement [Second] of Judgments 51(1) (1982)). As a general contractor, BMI is also in a vicarious liability relationship with its subcontractor, PB-KBB. See e.g., *United States v. Blair*, 321 U.S. 730 (1944).

There are two exceptions to the rule that bar an unsuccessful plaintiff from reasserting a claim against a subsequent defendant alleged to be vicariously liable to the original defendant. Such a claim may not be reasserted unless: (1) the claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or (2) the judgment in the action was based on a defense that was personal to the

is a defendant in the first action. Restatement (Second) of Judgments §51(1) (1982). In this case, the complaint is based upon Paul's allegation that PB/PB-KBB and BMI submitted "a false or fraudulent claim for payment or approval [to the DOE]." §31 U.S.C. §3729(1). Paul alleged in the prior lawsuit that his certifying design plans for the project, which he believed were dangerous, would have constituted a violation of §22.05 of the Texas Penal Code, which proscribe "reckless conduct." Paul alleges that his refusal to certify the plans resulted in his termination. In addition, if Paul would have certified the project design,he would have played a role in the submission of the allegedly false claim to the DOE. Given the similarity between the two claims, the grounds for this complaint in this case could have been asserted in the first action.

The second exception also does not apply. The concept of "personal defense" is addressed by the Texas Business and Commercial Code in its explanation of the rights of the holder in due course of a negotiable instrument. A holder in due course may take an instrument free from all defenses of any party to the instrument with whom the holder has not dealt, except personal defenses. Tex. Bus. & Comm. Code §3.305 (1967).[4] Because PB- KBB's defense to the wrongful discharge action was not a personal defense, the second exception does not apply.

---

[4]The Texas Business and Commercial Code defines the five personal defenses as: (1) Infancy...; and (2) such other incapacity, or dures, or illegality of the transaction, as renders the obligation the party a nullity;... (3) ...misrepresentation [that] has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms;... (4) discharge in insolvency proceedings; and (5) any other discharge of which the holder has notice when he takes the instrument. Tex. Bus & Comm. Code §3.304 (1967).

Res judicata operates on the principle that any cause of action which arises out of the same facts should, if practicable, be litigated in the same suit. *Barr*, 837 F.2d at 631. A different cause of action has been defined by Texas courts as "one that proceeds not only on a sufficiently different legal theory but also on a sufficient different factual footing." *Hoque,* 937 F.2d at 1253. To be considered "different," the cause of action must differ in the theories of recovery, the operative facts, and the measure of recovery. *Id.*

In examining the above three factors, Texas courts have utilized the transactional approach to claim preclusion. *Barr*, 837 F.2d at 631. The transactional approach "provides that a final judgment an action extinguishes the right to bring suit on the transaction, or a series of connected transactions, out of which the action arose." *Id.* In analyzing the transactional approach, factors to be considered are: (1) whether the facts are related in time, space, origin, or motivation; (2) whether they form a convenient trial unit; and (3) whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage. *Id.* (Quoting Restatement of Judgment 24(2).)

In this case, the complaint arose form the same operative facts that gave rise to the prior lawsuit. The claims in Paul's complaint could have been adjudicated with the prior lawsuit, forming a convenient trial unit. As aforementioned, Paul alleged in the prior lawsuit that PB-KBB was engaged in illegal activities and his failure to participate in those activities led to his discharge. Paul alleges that PBQ&D and BMI participated with PB-KBB in the illegal acts. Although the complaint asserts a new theory and measure of recovery, the alleged filing of false or fraudulent claims, the operative facts are the same as those in the prior lawsuit.

The second factor of transactional approach, whether the two clams could have formed a "convenient trial unit, "

The following is a jurisdictional question. Whether the state court had jurisdiction over the federal False Claims Act claims is a question of first impression in this circuit. After a thorough review of other jurisdictions, it appears that only one other court has decided the question whether there is exclusive federal jurisdiction over cases brought pursuant to the False Claims Act. In *United States ex rel. Hartigan v. Palumbro Bros., Inc.*, the court held that there is concurrent jurisdiction over the False Claims Act cases.[5]

In *Tafflin v. Levitt*, 493 U.S. 455 (1990), the Supreme Court discussed concurrent jurisdiction in holding that federal civil RICO suits could be brought in state court. The Court recognized that it has "consistently held that state courts have inherent authority and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Id.* at 460. State courts are courts of general jurisdiction. When a federal statute intends that claims arising under it be litigated in a specific jurisdiction, the statute will explicitly state that suit may be brought "only" in federal court, or that the jurisdiction mentioned by the statue shall be "exclusive." *Id.* at 801 (Scalia, J. concurring). If exclusive jurisdiction is neither express nor implied by the statute, state courts will have concurrent jurisdiction. *Claflin v. Houseman*, 93 U.S. 130, 136 (1876).

The False Claims Act states that an action arising under it "may" be brought in federal court. 31 U.S.C. §3732 (1876). Thus, pursuant to the language of the statute, there is concurrent jurisdiction between the federal and state courts. See *Charles Dowd Box Co. v. Courtney*, 638 U.S. 502 (1962).

Finally, the third element of the transactional approach to claim preclusion states that future claims will be barred if it is reasonable to presume that the parties would expect the two actions to be treated together in the original case.

---

[5]597 F.Supp. 624 (N.D. Ill. 1992)

Inasmuch as the facts and claims in the state and federal cases are almost identical, it is apparent that the two cases could have been tried together. See *Ocean Insurance Co. v. Fields*, 18 F.Cas. 532 (C.D.D. Mass. 1841) (No. 10, 406). Therefore, based on the foregoing, the Court hereby

ORDERS that the Motion to Dismiss is GRANTED and the request for Sanctions is DENIED. It is further ORDERED that the complaint against BMI is DISMISSED. All relief not specifically granted herein is DENIED

SIGNED at Houston, Texas, on this 29 day of July, 1994.

----s----

DAVID HITTNER

United States District Judge.

Appendix 5

THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA) ex rel. DILIP KUMAR PAUL,	)	CIVIL ACTION
Plaintiff,	)	No. H-92-2429
v.	)	
PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. and PB-KBB,	)	
Defendants.	)	

ORDER

Defendants' Motion for Protective Order (Docket Entry #33) is GRANTED.

Plaintiff's Motion to Compel Discovery (Docket Entry #39) is DENIED.

It is ORDERED that Defendants shall respond to Plaintiff's Request for Production of Documents on or before 30 days after the date the Court rules on defendants' Motion to Dismiss.

SIGNED at Houston, Texas, on this 8th day of February, 1994.

----s----
Marcia A. Crone
United States Magistrate Judge

(2)

Supreme Court, U.S.
FILED
AUG 28 1996
CLERK

No. 96-145

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

UNITED STATES ex rel. PAUL,
Petitioner,

v.

PARSONS, BRINKERHOFF,
QUADE & DOUGLAS, INC. et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT BATTELLE MEMORIAL INSTITUTE, PROJECT MANAGEMENT DIVISION

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Project Management Division
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30 pp

QUESTION PRESENTED

I. Whether the district court abused its discretion in denying the Petitioner's motion, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, for relief from that court's earlier order dismissing Petitioner's False Claims Act ("FCA") complaint, brought pursuant to 31 U.S.C. § 3730(b) (1994), on the basis that Petitioner's action was barred by res judicata, where Petitioner failed to satisfy the requirements of Rule 60(b), warranting relief from the dismissal of this action.

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JURISDICTION

A final decision was issued by the United States District Court for the Southern District of Texas on August 9, 1995 and that decision was affirmed by the United States Court of Appeals for the Fifth Circuit on April 26, 1996. United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., Civil Action Number H-92-2429 (S.D. Tex. August 9, 1995), aff'd without op., 85 F.3d 624 (5th Cir. 1996). Petitioner filed the instant Petition for Writ of Certiorari ("Pet.") within ninety days of that denial. Accordingly, the Petition was timely filed under Rule 13.1 of the Supreme Court Rules. See 28 U.S.C. § 1254.

Although this Court has jurisdiction to review this case under Rule 13.1 and 28 U.S.C. § 1254, Respondent Battelle Memorial Institute ("BMI") continues to assert -- as it did before the district court and the Fifth Circuit -- that the federal courts lack subject matter jurisdiction over this case. Briefly, under the FCA, the federal courts lack jurisdiction over any cause of action arising prior to 1986 if the "action is based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982), amended by 31 U.S.C. § 3730(e)(4) (1994). For claims arising after 1986, the courts have no jurisdiction over actions based upon publicly disclosed allegations or transactions unless the relator is the "original source" of that information. 31 U.S.C. § 3730(e)(4) (1994). As BMI asserted before the lower courts, Petitioner's FCA suit contains no information that the Government did not have when the action was brought, all of Petitioner's allegations had been publicly disclosed when the action was brought and Petitioner is not an "original source." Consequently,

there is no federal court subject matter jurisdiction over this action.

PROCEDURAL HISTORY

BMI is a non-profit charitable trust organized as a non-profit corporation under the laws of the State of Ohio.[1/] Its primary activity is the performance of research, development, management, and technical services on a contract basis for industrial, federal, state, and local governmental clients. Petitioner Paul is an engineer who, in 1982, worked for Respondent PB-KBB, one of two companies constituting a joint venture that was a subcontractor to BMI. The joint venturers were Respondents PBQD, a New York corporation, and PB-KBB, a Delaware corporation.

On August 10, 1992, Paul filed a complaint in the United States District Court for the Southern District of Texas under the qui tam provisions of the FCA, 31 U.S.C. § 3730(b) (1994), against PB-KBB and PBQD. On September 11, 1992, Paul filed a qui tam complaint against BMI containing virtually identical allegations. On April 1, 1993, pursuant to 31 U.S.C. § 3730(b)(4)(B), the United States filed a Notice of Election Not to Intervene in this action. On July 14, 1993, the district court ordered the consolidation of

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1/ In addition to BMI, a listing of the parties in the lower court proceedings, as required by Rule 14.1(b) of the Supreme Court Rules, includes: (1) Petitioner Dilip Kumar Paul ("Paul"); (2) Respondent P.B.-K.B.B., Inc. ("PB-KBB"); and (3) Respondent Parsons, Brinkerhoff, Quade & Douglas, Inc. ("PBQD"). Pursuant to Rule 29.1 of the Supreme Court Rules, BMI states that it has no parent companies, however, it has two non-wholly owned subsidiaries: (1) Geosafe Corporation; and (2) Research Insurance Company Limited. Both of these subsidiaries are approximately 99% owned by BMI.

Paul's complaint against PBQD and PB-KBB with the action against BMI. The district court subsequently granted BMI's motion to dismiss. United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 860 F. Supp. 310, 372 (S.D. Tex. 1994).

On August 30, 1994, Paul filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. On April 28, 1995, the Fifth Circuit affirmed the district court ruling. United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 53 F.3d 1282 (5th Cir. 1995) (unpublished opinion).

Thereafter, Paul filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure, in the district court, on July 17, 1995, seeking relief from the Court's earlier order dismissing Paul's qui tam suit on the basis that Paul's action was barred by res judicata. Primarily, Paul argued that, based upon purported newly discovered evidence, the prior state-court judgment was void, and, thus, could not be the basis for the district court's finding of res judicata. Among numerous contentions, Paul asserted that the prior state-court judgment was not a "final judgment on the merits" because: (1) the Texas state court lacked subject matter jurisdiction and in personam jurisdiction over certain purportedly "indispensable parties" (even though Paul was the party that filed that action in Texas and failed to join those "indispensable parties); and (2) according to Paul, PB-KBB fraudulently obtained the prior state-court judgment. In addition, Paul attempted to re-argue that: (1) there is no privity between PBQD and PB-KBB, permitting the application of res judicata; (2) there could be no res judicata because his FCA claim could not have been brought in the Texas state court; and (3) the state-court action and the instant case did not arise "from the same nucleus of operative facts." Without

elaboration, the district court on August 9, 1995 summarily denied Paul's Rule 60(b) motion. Paul, Civil Action Number H-92-2429 (S.D. Tex. August 9, 1995).

On September 6, 1995, Paul filed a Notice of Appeal, in the United States Court of Appeals for the Fifth Circuit, attempting to reargue many of the matters previously addressed by the Fifth Circuit. Specifically, he argued that: (1) jurisdiction over the FCA suit lies solely in the federal court and, therefore, he could not have included his FCA claims in his prior state-court action; (2) the prior state-court judgment was not a "final judgment on the merits" because: (a) the Texas state court lacked subject matter jurisdiction and in personam jurisdiction over purportedly "indispensable parties," and (b) according to Paul, PB-KBB fraudulently obtained the prior-state-court judgment; (3) it was inappropriate for the district court to rely upon Texas state law when assessing the res judicata impact of the prior state-court ruling; (4) the FCA claims and the prior state-court action did not constitute the same cause of action; and 5) the res judicata bar is inappropriate because PBQD, BMI and the United States were not parties to the state-court action. Paul further argued that a United States Magistrate Judge was without authority to rule, without Paul's consent, on his motion to compel production of documents, and the case should not have been dismissed without permitting him to engage in discovery.

While the appeal of the district court's denial of this motion under Rule 60(b) of the Federal Rules of Civil Procedure was pending, Paul filed, on December 12, 1995, a Petition for Writ of Certiorari in the United States Supreme Court. In that Petition, Paul sought review of the district court's decision dismissing his

case, Paul, 860 F. Supp. 370, aff'd without op., 53 F.3d 1282 (5th Cir. 1995). On January 22, 1996, the Court denied Paul's Petition. United States, ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 116 S.Ct. 817 (1996).

Subsequently, on April 26, 1996, the Fifth Circuit issued its opinion affirming the district court's denial of the motion under Rule 60(b) of the Federal Rules of Civil Procedure. United States, ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 85 F.3d 624 (5th Cir. 1996). The Fifth Circuit, in an unpublished opinion, found: (1) that Paul had failed to show that the district court abused its discretion in denying his motion to dismiss under Rule 60(b)(3) because of fraud, misrepresentation, or other misconduct of an adverse party; (2) the absence of purportedly "indispensable parties" in the Texas state court trial does not create a jurisdictional defect and does not provide a basis for collaterally challenging the state court's judgment; (3) that Paul's argument that the Texas state courts were without jurisdiction to resolve legal issues involving claims that arose in other jurisdictions was without merit, because the fact that a claim arose in another jurisdiction, and may have impacted that jurisdiction more directly, is not determinative of the court's authority to render a judgment; (4) that Paul had abandoned the issue of the state court's personal jurisdiction over contracts negotiated and executed in Ohio by failing to brief this issue on appeal; and
(5) that Paul's argument, that claims against individuals who were not named in the state court suit may not be barred by the doctrine of res judicata, is without merit as the court had previously found that there was privity among all of the defendants and that the claims against them were barred. Paul v. Parsons, Brinkerhoff, Quade, & Douglas, No. 95-20733, slip op.

(5th Cir. April 26, 1996). The Fifth Circuit further admonished Paul that:

> any additional frivolous appeals filed by him will invite imposition of sanctions, Paul is further cautioned to review any pending appeals to ensure that they are not frivolous because they have been previously decided by this court.

Id. Paul's second appeal was accordingly dismissed and a sanctions warning issued.

Despite the Fifth Circuit's clear warning that "his appeal is frivolous and is dismissed" Paul has again filed the instant Petition for Writ of Certiorari in this Court, raising substantially the same issues raised in his prior Petition for Writ of Certiorari, that was decided on January 22, 1996. The only difference between the two petitions is that the standard of review, if the second petition were granted, would be whether the district court abused its discretion in refusing to reconsider the rulings left standing by this Court's denial of the first Petition. Such an issue can hardly merit the Court's intervention. As there are no conflicting court decisions with the instant case and there are no important questions of federal law to be decided, settled, or that are in conflict with relevant decisions of this Court, Paul's Petition should be denied. See Rule 10 of the Supreme Court Rules.

BACKGROUND FACTS

A. Contract History

From 1965 to the present, BMI has provided research and development services to the U.S. Department of Energy ("DOE") as the contractor

operating the Pacific Northwest Laboratories located in Richland, Washington. On April 28, 1978, BMI was assigned responsibility for the management of DOE's National Waste Terminal Storage Program. In particular, BMI was directed to and did establish a new Project Management Division responsible for (1) identification of potential sites with salt formations and/or other geological formations within the United States suitable for development for potential nuclear waste repositories, and (2) the coordination and direction of the development of criteria and specific technologies required for exploration, design, licensing, construction, operations, and monitoring of these repositories.

Effective June 14, 1982, BMI and a joint venture (comprised of PBQD and PB-KBB) known as Parsons Brinkerhoff/P.B.-K.B.B. ("PB/PB-KBB") entered into a subcontract, pursuant to which PB/PB-KBB was to provide architectural and engineering design services relating to the construction of exploratory shafts that would be used to investigate the geological features of potential nuclear waste disposal sites in salt formations (the "Subcontract"). On October 7, 1982, DOE approved the Subcontract.

B. Litigation History

Paul was hired by PB-KBB in May 1981. In June 1982, he was assigned to work on the Exploratory Shaft Facility design, the project encompassed by the Subcontract. Paul alleges that he soon concluded the preliminary design specifications were inconsistent with requirements under federal mine safety standards. Paul claims that he informed his supervisors, orally and in writing, of his concerns. According to Paul, these acts resulted in his transfer to another division at PB-KBB and, ultimately -- twelve days after drafting

a memorandum summarizing his concerns -- to his discharge.

In 1983, Paul brought a Title VII action in the United States District Court for the Southern District of Texas against PB-KBB, Civil Action No. H-83-3409, alleging that he was discharged on the basis of his national origin. That action was dismissed without prejudice by stipulation of the parties on June 7, 1984. Paul then filed an action under the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 801 et seq. (1994), with the Secretary of Labor, wherein he argued that, in violation of § 815(c)(1) of the Mine Act, he was fired because of his safety complaints. Paul v. P.B.-K.B.B., Inc., 3 MSHC 2006, 2007 (1985). The Secretary of Labor rejected Paul's claim. Id. Paul appealed the Secretary's decision to the Federal Mine Safety and Health Review Commission ("the Commission"). Id. at 2008. The Commission, however, upheld the Secretary's decision. Id. Paul then appealed the Commission's ruling to the United States Court of Appeals for the District of Columbia Circuit, which upheld the Secretary. Paul v. Federal Mine Safety and Health Review Comm'n, 812 F.2d 717, 718 & 720 (D.C. Cir.), cert. denied, 483 U.S. 1023 (1987).

Undeterred, Paul then brought an action in Texas state court, alleging that he was wrongfully discharged for his unwillingness to commit a criminal act. Paul v. P.B.-K.B.B., Inc., 801 S.W.2d 229 (Tex. App. -- Houston [14th Dist.] 1990, writ denied). In that action, Paul contended that "the preliminary study [prepared by PB-KBB] called for one shaft rather than two and that this design 'could've killed people.'" Id. at 229. Paul argued that, as the engineer, he would be called upon to certify the plans and specifications, and doing so would be a violation of § 22.05 of the Texas

Penal Code which proscribes "reckless conduct." Id. According to Paul, it was these objections to the project, that resulted in his termination. Id. at 230. After trial, the jury found that Paul was not fired solely because he refused to commit an illegal act. On appeal, the verdict was affirmed. Id. at 230.

Paul attempted to dress up his losing state-court action in new federal clothing by filing a complaint in the United States District Court for the Southern District of Texas. However, as the same operative facts underlay both actions, the district court dismissed his federal action based on res judicata. This ruling was affirmed by the Fifth Circuit and Paul's Petition for Writ of Certiorari denied by this Court. Paul, 860 F. Supp. 370 (S.D. Tex. 1994), aff'd without op., 53 F.3d 1282, cert. denied, 116 U.S. 817 (1996).

Paul thereafter filed, in the district court, his motion for reconsideration of the order dismissing his federal complaint, pursuant to Federal Rule of Civil Procedure 60(b). This motion was denied by the district court and affirmed by the Fifth Circuit. Paul, H-92-2429 (S.D. Tex. August 9, 1995), aff'd without op., 85 F.3d 624 (5th Cir. 1996). Paul then filed the instant Petition for Certiorari seeking review of the district court's denial of his motion for reconsideration and the Fifth Circuit's review of that decision.

SUMMARY OF ARGUMENT

Paul's petition, although presented in five separate questions, may only raise one issue in this Court: whether the district court abused its discretion in denying Paul's motion, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, for relief from that court's earlier order dismissing Paul's qui tam suit on the basis that Paul's action was barred by res judicata,

where Paul failed to satisfy any of the elements under Rule 60(b) warranting such relief, but instead offered only conclusory allegations of purported fraud and of jurisdictional defects in the prior state-court action.

ARGUMENT

I. The District Court Correctly Denied Paul's Motion to Dismiss Under Rule 60(b) of the Federal Rules of Civil Procedure

A. Standard of Review

Rule 60(b) of the Federal Rules of Civil Procedure provides, in part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other

> reason justifying relief from the operation of the judgment . . . .

The review of a district court's denial of a Rule 60(b) motion is extremely limited. See Wilson v. Thompson, 638 F. 2d 801, 803 (5th Cir. Unit B Mar. 1981) ("the determination of the district court is subject to review only for an abuse of discretion"); see also Travelers Ins. Co. v. Liljeberg Enters., Inc., 38 F.3d 1404, 1408 (5th Cir. 1994) ("[i]t is not enough that the granting of relief might have been permissible, or even warranted -- denial must have been so unwarranted as to constitute an abuse of discretion.") (citation omitted). Appellate review of the denial of a Rule 60(b) motion, is further limited to whether the district court abused its discretion in denying the motion for reconsideration, but not the underlying judgment. See Browder v. Director Ill. Dept. of Corrections, 434 U.S. 257, 263 n.7 (1988) ("The Court of Appeals may review the ruling only for abuse of discretion, however, and an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review.")

B. Jurisdiction Of The State Court

Paul sets forth five questions in his Petition. In questions two, three, and four, Paul attacks the validity of the state court judgment by arguing that the state court did not have jurisdiction over the action. Specifically, in question two of the Petition, Paul argues that the absence of "indispensable" parties in the Texas state court case creates a jurisdictional defect thereby rendering that judgment void. In question three, Paul contends that the Fifth Circuit erred in finding that Paul had abandoned his contention that the state court lacked in personam jurisdiction because the contracts at issue in the case were negotiated and

executed in Ohio, for work performed in Utah, Louisiana, Texas, and Mississippi. In question four, Paul challenges the Fifth Circuit's finding that the state court had jurisdiction over legal issues involving claims that arose in other jurisdictions.

1. The Alleged Absence Of Indispensable Parties In The State Court Case Does Not Impact The Validity Of The Texas Judgment

Paul contends that the state court judgment was void because "indispensable" parties were not joined. Although his allegations are unclear, Paul appears to argue that PB-KBB, in the prior state-court action, concealed the fact that Paul was replaced on the project by two Canadians. Because these "Canadians" were "indispensable" parties in the state-court action, their absence renders the state-court action void for lack of subject matter jurisdiction and lack of in personam jurisdiction over the Canadians. He also claims that PB-KBB committed fraud in the prior state-court action because PB-KBB stated that Paul's employment was terminated due to a "lack of work," after assigning his job functions to the Canadians. See Pet. at 17. According to Paul, PB-KBB could not have committed this "fraud and perjuries [sic]" in the state court if the Canadians were joined as parties. Id.

Even if Paul had, in fact, presented newly discovered evidence to the district court that: (1) he was replaced by "two Canadians" and (2) PB-KBB's explanation for Paul's termination in the state-court action was false, and he demonstrated that he exercised due diligence in discovering the evidence, such "facts" are not material and do nothing to change the outcome in this case. See, e.g., Washington v. Patlis, 916 F.2d 1036, 1038 (5th Cir. 1990) (noting that

Rule 60(b) movant must show that the new evidence would likely produce a different trial result). That is, even if Paul had been replaced by "two Canadians," that fact would do nothing to remove the jurisdiction of the state court in the prior action. Further, even if PB-KBB had presented a false explanation in the prior state-court action as to why Paul was terminated, the state-court judgment would still be valid for purposes of res judicata.

Paul's argument that the absence of indispensable parties defeated the state court's jurisdiction over his case is also without merit. The state-court action was brought by Paul in a court of general jurisdiction in Harris County, Texas. See Tex. Gov't Code Ann. § 24.007 ("Jurisdiction") (Vernon 1988). That action concerned whether, under Texas state law, Paul had been wrongfully terminated from his employment in PB-KBB's Houston, Texas office. Paul, 801 S.W.2d at 229. Paul, as the plaintiff in that case, chose the forum and elected to bring the action in Texas state court. Clearly, there would have been no basis upon which Paul could have attacked the state court's subject matter jurisdiction over his state law claim before the district court in the instant action. See generally Restatement (Second) of Judgments § 12 (1982) (noting that parties are precluded from litigating a "court's subject matter jurisdiction in subsequent litigation [unless] [t]he subject matter jurisdiction of the action is so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority"). The district court, therefore, did not abuse its discretion in rejecting this meritless argument.

Still, in his Rule 60(b) motion, Paul presented an assertion that somehow the Texas state court lacked in personam jurisdiction over "an essential party, the

Canadians," who "conspir[ed] to have [] Paul fired," and, thus, the state-court judgment was invalid. Paul makes the same assertion in his Petition. See Pet. at 16. Although the true nature of Paul's contention is difficult to ascertain, apparently Paul believes that after he was terminated, his job functions were transferred to two Canadians "illegally working" in the United States, and the "Texas state court[] lack[ed] in personam jurisdictions [sic] over these foreign citizens, who are indispensable parties." Paul believes that these Canadian employees were "indispensable part[ies]," and the Texas state court's judgment was void "due to the . . . lack of in personam jurisdiction over [the] Canadian domiciles." Yet, Paul never named these purported "indispensable parties" as defendants in the state-court action, and Paul participated fully in that action, without raising the issue of joinder of additional parties.

Moreover, even accepting Paul's groundless claims that his job functions were transferred to two Canadians and that he was "unaware" of this "fact," Paul has presented no facts to suggest that indispensable parties were lacking in the prior Texas state-court action. Rule 39 of the Texas Rules of Civil Procedure, which parallels Rule 19 of the Federal Rules of Civil Procedure, addresses the joinder of indispensable parties. Tex. R. Civ. P. 39 (West 1995); see also Fed. R. Civ. P. 19. Essentially, the purpose of the federal and state joinder rules is to ensure that the interests of all parties to litigation are protected. See generally Schutten v. Shell Oil Co., 421 F.2d 869, 873 (5th Cir. 1970); Vondy v. Commissioners Court of Uvalde County, 620 S.W.2d 104, 106-07 (Tex. 1981). For example, the right of a defendant not to be subjected to multiple litigation and potential inconsistent obligations are central concerns under these rules. Id.; Schutten, 421 F.2d at 873. Paul has

presented no facts that "the Canadians" had any interest in the state-court action such that they should have been joined as parties, and he has not explained how "the Canadians" could have been liable to Paul under the applicable state law in that case. Further, Paul fails to explain how his rights could not be fully litigated in the prior state-court action or how there was any possibility of inconsistent judgments. Paul's purported newly discovered evidence, therefore, would do nothing to alter the outcome from the district court's dismissal of the action. Consequently, the district court did not abuse its discretion in denying Paul's Rule 60(b) motion. See Paul, 95-20733, slip op. (5th Cir. April 26, 1996) (noting that in his Appellate Brief, Paul failed to explain: why the interests of these absent parties were negatively affected because they were not joined as defendants in the state court action; how the absent parties would have been liable to him under the state law; and why the absence of these parties created a jurisdictional defect).

2. Paul Has Effectively Abandoned His Contention That The State Court Lacked Jurisdiction Over Contracts Negotiated In Other States By Failing To Brief It On Appeal To The Fifth Circuit

In Question Three, Paul appears to be arguing that the state court lacked jurisdiction over the original action because the contracts at issue were negotiated in other states. The Fifth Circuit found that Paul had abandoned this issue by failing to brief it on appeal. Paul, 95-20733, slip op. (5th Cir. April 26, 1996) (citing to Brinkman v. Dallas County Deputy Sheriff Abner, 813 F.2d 744, 748 (5th Cir. 1987)). In his Petition, Paul strenuously objects to this finding, pointing out the various places that he supposedly raised the issue.

See Pet. at 20-24. However, Paul points to various pleadings in the *district court* where he purportedly raised the lack of the state court's jurisdiction over contracts negotiated and executed in other states. Apparently, Paul misunderstands the principle that an issue not raised on appeal is "effectively abandoned." See Al-Ra'Id v. Ingle, 69 F.3d 28, 33 (5th Cir. 1995). Accordingly, Paul's detailed descriptions of where he argued this issue in the district court are irrelevant.

Paul also argues that he did brief this issue in his appeal to the Fifth Circuit of the district court's denial of this motion under Rule 60(b), and cites to various places in his Fifth Circuit Appellate Brief in which he allegedly raised this issue: (1) in the Statement of the Case; (2) in Issue Number Three of his Appellate Brief; and (3) in Issue Number Five of his Appellate Brief. Contrary to Paul's contention that he briefed the issue of the state court's jurisdiction over contracts negotiated and executed in other states, the citations to which he directs this Court relate to other, miscellaneous issues but do not address his jurisdictional argument. Accordingly, Paul may not seek redress in this Court of this particular issue.

3. Paul's Argument That The State Court Did Not Have Jurisdiction Over Claims That Arose In Other Jurisdictions Does Not Impact The Validity Of That Judgment

In Question Four, Paul appears to argue that the state court did not have jurisdiction over claims that arose in other jurisdictions. As the Fifth Circuit noted:

> Paul's argument goes to the subject-matter jurisdiction of the state court to

> adjudicate claims arising in other jurisdictions. While the place where the alleged tort occurred may be pertinent to personal jurisdiction, venue, or the question of which forum's law should be applied, the fact that a claim arose in another jurisdiction and may have impacted that jurisdiction more directly is not determinative of the court's authority to render a judgment.

Paul, 95-20733, slip op. (5th Cir. April 26, 1996). Paul's argument that the state court did not have subject matter jurisdiction over certain of his claims is without merit. Accordingly, the district court did not err in refusing to grant his motion to reconsider on the basis that the state court judgment is void for lack of subject matter jurisdiction.

C. Paul Improperly Raises The District Court's Underlying Decision Which Is Not Reviewable In The Instant Appeal

In question five of the Petition, Paul appears to be arguing that the district court erred in finding that his federal action was barred by res judicata. The district court's ruling based on res judicata has been affirmed by the Fifth Circuit and Paul's previous Petition for Writ of Certiorari in this Court denied. See Paul, 860 F. Supp. 370 (S.D. Tex. 1994), aff'd 53 F.3d 1282 (5th Cir. 1995), cert. denied, 116 S.Ct. 817 (1996). Therefore, he cannot raise this issue yet again in the these proceedings. Rather, the scope of review in these proceedings is limited to determining whether the district court erred in denying Paul's motion to dismiss under Rule 60(b) of the Federal Rules of Civil Procedure. It is not to reargue whether the underlying district court decision, dismissing the case based on res

judicata was correct. See Gulf Coast Bldg. and Supply Co. v. International Brotherhood of Electrical Workers, 460 F.2d 105, 1107 (5th Cir. 1972) (where a matter has been affirmed on appeal, "whatever was before the appellate court and disposed of by the decree is considered as finally settled and becomes the law of the case.").

D. **The District Court Did Not Abuse Its Discretion In Denying Paul's Rule 60(b)(3) Motion, Because, Even Assuming That Paul Could Establish That The Defense Of His State Case Was Predicated Upon Factually False Evidence, Paul Has Failed To Demonstrate that He Was Prevented From Fully And Fairly Presenting His State Court Case**

In question one of the Petition, Paul contends that the district court erred in denying the motion for reconsideration based on fraud committed during the Texas state proceedings, which he only discovered when he filed the instant lawsuit. See Pet. at 14. Specifically, Paul argues that during the state court trial, attorneys' representing PB-KBB, presented evidence by "perjuring, denying, contradicting and disputing their prior testimonies to the Federal Mine Safety Review Commission's proceedings . . . ." Id. According to Paul, as the trial proceeded on an unscheduled date, Paul was unable to attend the trial to "challenge" the "fraudulent and perjurious testimonies [sic] presented by PB-KBB in front of the Jury." Id. Further, according to the Petition, testimony presented by PB-KBB was inadmissible under Texas Rules of Evidence and Texas Rules of Civil Procedure, rendering the state court judgment void.

Even assuming arguendo that a judgment was obtained by fraud, that judgment is still res judicata in a subsequent action, provided the prior court had jurisdiction to render the judgment. See Vandervoort, Sams, Anderson, Alper & Post, P.A. v. Vandervoort, 529 F.2d 424, 426 (5th Cir. 1976) (noting that a "collateral attack on a judgment" based upon fraud is "irrelevant" once "it [has been] determined that the court had jurisdiction"); Midessa Television Co. v. Motion Pictures for Television, Inc., 290 F.2d 203, 205 (5th Cir.), cert. denied, 368 U.S. 827 (1961); see also Slangal v. Getzin, 148 F.R.D. 691, 694 (D. Neb. 1993) ("Generally, a judgment of a court may not be collaterally attacked . . . unless the court was without jurisdiction to reach that decision."); see generally 21 Federal Procedure, L. Ed. § 51:188 (1984) ("As a general rule, even if a judgment that was obtained by fraud it is res judicata so long as the court rendering it had jurisdiction to do so.")

The only exception to the above stated general rule is that a collateral attack may be permitted on a prior judgment if the attack is based upon "extrinsic," rather than "intrinsic," fraud. Fidelity Standard Life Ins. Co. v. First Nat'l Bank & Trust Co., 382 F. Supp. 956, 963 (S.D. Ga. 1974) ("[T]he impeachment of a foreign judgment is limited to existence of fraud that is extrinsic in nature . . . ."), aff'd, 510 F.2d 272 (5th Cir.), cert. denied, 423 U.S. 864 (1975); Gilbert v. Franklin County Water Dist., 520 S.W.2d 527, 533 (Tex. Civ. App. -- Texarkana 1975, no writ) ("Neither a collateral nor direct attack upon a prior judgment can be based upon intrinsic fraud.") see also Slangal, 148 F.R.D. at 694. "'[I]ntrinsic fraud' [includes] false testimony, fraudulent instruments, and any fraudulent matter that was presented and considered in rendering a judgment." Raney v. Mack, 504 S.W.2d 527, 533 (Tex. Civ. App. -- Texarkana 1973, no writ). By

comparison, "fraud that is extrinsic in its nature, [prevents] one from having a real contest of the suit based on conduct or activities outside of the court proceedings themselves." Fidelity Standard Life Ins. Co., 382 F. Supp. at 963. Such "extrinsic" fraud "must be collateral to the matter tried, and not something which was actually or potentially in issue in the trial." Raney, 504 S.W.2d at 533; see generally Restatement (Second) of Judgments § 70, Comment b. (1982).

In the instant case, the fraud that Paul claims occurred in the state-court action consists solely of allegations of "intrinsic" fraud. Paul's argument is that in the state-court proceeding, PB-KBB put forth "fraudulent [and] perjurious" explanations as to why Paul had been dismissed. See Pet. at 13-14. Yet, the reason for Paul's termination was the exact issue that was before the state court. Paul, 801 S.W.2d at 229. Where the purported fraud "relates to the material issues in the [] case," then the attack on the prior judgment solely involves "intrinsic" fraud and cannot be the basis for a collateral attack. Gilbert, 520 S.W.2d at 505-06. Because the alleged fraud relates solely to the issue pending before the state court, accepting Paul's allegations as true, the outcome of the district court's order would have been no different. As the Fifth Circuit noted:

> [e]ven if it its assumed that Paul can establish by clear and convincing evidence that the defense was predicated upon factually false testimony, Paul has failed to demonstrate that he was prevented from fully and fairly presenting his state court case. Therefore, Paul has failed to show that the district court abused its discretion in denying his motion under Rule 60(b)(3) because of

'fraud, misrepresentation, or other misconduct of an adverse party.

Paul, No. 95-20733, slip. op. (5th Cir. April 26, 1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
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No. 96-145

In The
Supreme Court Of The United States
October Term, 1996

UNITED STATES OF AMERICA
EX. REL. DILIP K. PAUL,
Petitioner

v.

U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION and PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC., PB-KBB, INC. and BATTELLE MEMORIAL INSTITUTE,
Respondents

On Petition For A Writ Of Certiorari
The United States Court Of Appeals
For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner hereby brings to the court's attention a number of factually erroneous and misleading assertions made in the Brief in Opposition.

Misstatements made under "JURISDICTION":

In its statement of jurisdiction, respondent Battelle Memorial Institute (BMI) stated that this court lacked jurisdiction to try False Claims Act (FCA) related issues arose prior to 1986 amendment. This assertion is erroneous as this court has already decided in Gravitt v. General Electric Co., S.D.Ohio 1988, 680 F.Supp 1162, appeal dismissed 848 F.2d 190, certiorari denied 109 S.Ct. 250, 102 L.Ed.2d 1239., that the 1986 amendment of FCA applies retroactively.

BMI then asserted that petitioner Paul is not the original source of information on which the instant case is filed. BMI's this assertion is not only untrue, it is also fraudulent. The courts below checked this fraudulent and rejected BMI's contentions on this issue. Petitioner has submitted written evidence which shows he is not only the sole and original source of information upon which this action is based, but also the Government had no information of BMI's and its subcontractors' defrauding the United States.

PROJECT HISTORY.

BMI, masquerading as a Tax Exempt

Organization, received Department of Energy's contract for managing the Nuclear Waste Isolation project. It did not have the necessary background or integrity to undertake such responsible operation. From 1969, it had squandered billions of tax payers' dollars in its sham undertaking. It had not only conspired with PBQD/PB-KBB in defrauding the United States in the instant contract. It had entered a number of other contracts such as Basalt Waste Isolation Project, Compressed Air Energy Storage Project, with the same group of subcontractors, and in all of these case the United States have been defrauded. Consequently all of the projects collapsed and the United States lost money in the scheme. It is a pattern frauds and it is a racket. Battelle's untrue and misleading reply brief fully reflected its true character. The court may note that PB-KBB admitted to the Federal Mine Safety and Health Review Commission (FMSHRC) on July 28, 1983, that it is not a mining company, that it had lied in its bidding document as to its qualification to do the contracted for job, and that it did not care what the Government do with its fraudulent designs, Battelle went ahead and entered into more and more repeated fraudulent contacts with this group, until all of the contracted for the projects collapsed. Battelle admitted in the courts below that it gathered all of the litigating documents between the petitioner and PB-KBB, and obviously was aware of the PB-KBB's aforesaid judicial admissions. After knowing about PB-KBB's submitted false claims, Battelle along

with PBQD/PB-KBB, swindled the United States for another five years, 1983-1988. Needless to say, the Government could not, and cannot in future, realize any benefit from this scams. This group failed to produce a single piece of paper which is useful to the Government. Now they are fighting to keep their misdeeds hidden from the courts review.
The Congress, while amending the FCA in 1986, intended that the cheaters to be held liable for <u>all</u> consequential damages suffered by the United States as a result of their fraudulent schemes. For that reason, Battelle's argument under it Jurisdiction" heading is futile. It and its cheating buddies will be found liable for <u>all</u> foreseeable damages suffered by the United States whether occurred prior to 1986 or after 1986.

Further, the Congress, unequivocally and repeatedly stated in the litigation history and in the statute that the United States District Courts will have the jurisdiction to try False Claims Act related cases. In the Legislative history, P.L. 99-562, in Section 6, 31 U.S.C. 3734, while enacting the whistleblower protection provision in the FCA, the Congress stated on [page 35],

> "Jurisdiction for any actions under section 3734 of the False Claims Act <u>SHALL BE IN FEDERAL DISTRICT COURT"</u> [Emphasis added].

This court should defer to the Congressional expressed intent while deciding the jurisdictional issues of

this case. This court should reverse the lower courts' Unconstitutional holding that the state court has jurisdiction to try the instant case, disregarding Congresional enactments.

Petitioner's response under ARGUMENT.

1. Reply to the District Court correctly denied Paul's motion to dismiss under Rule 60(b) of the Federal Rules of Civil Procedure.

A. Under the Standard of Review, BMI stated the Rule under 60(b),

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: --- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) frauds (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.....

The discussion and argument put forward

by Battelle under this section is misleading, misconstrued and erroneous. The courts below have no authority to upheld a void judgment. The two cases did not originate from the same sets nucleus of operative facts. The courts below were presumptuous. The instant judgment is void because the state Court lacked subject matter jurisdiction, and in personam jurisdiction to try the instant case. Hence the doctrine of res judicata could not be utilized. The courts below reached a decision first and then went back and try to justify their Unconstitutional actions by random process of elimination. To the courts below, the end justified the means, instead of other way around, and hence this court should review their decisions.

Further, the doctrine of res judicata in the instant case is utilized unconstitutionally, unlawfully, erroneously, and disregarding material evidence on record. The courts below refused discovery requests and it presumed the judgment. That judgment is without due process, and hence it is void.

VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS.

Further, petitioner's rights in the instant case is protected under the False Claims Act. The courts below. by denying due process in the instant case, violated petitioner's protected rights guaranteed under the Fifth and 14th Amendments of the United States Constitution. The courts below stated arbitrarily that

petitioner lost an issue by not arguing. If that is the case, even by their own holdings, petitioner had protected rights. The courts below denied that issue to him arbitrarily on July 29, 1994, when the First Summary Judgment was issued by the district court. In that case, when the court issued warning of sanction, it violated petitioner's liberty interests as well, without due process. The courts below, by their rulings, not only encouraged unlawful activities, but also denied petitioner's rights guaranteed under the United States Constitution. This court has a duty protect the petitioner from arbitrary court actions.

B. Reply to Jurisdiction of the State Court.

As already discussed under the issue of jurisdiction, the Congress did not give the state courts jurisdiction to try the instant case.

1. Reply to The Alleged Absence of Indispensable Parties In the State Court Does not Impact the Validity of the Texas judgment.

petitioner has already discussed this issue in his main brief. The Texas judgment is void.

Further, the instant judgment declaring res judicata is void, because both of the cases did not originate from same sets of facts. The Canadians are an indispensable party in the instant case as they are the partial assignee of the

Battelle/PBQD-PB-KBB contract.

2. Reply to Paul has Effectively abandoned his contention that the state court lacked jurisdiction over contract negotiated in other states by failing to brief it on appeal to the Fifth Circuit.

Petitioner did not abandon the issue. He brought and discussed the issue it fully. The jurisdictional issue is addressed as shown below:

"ISSUE NO. 3: Whether Harris County District Court has the authority to try a case arose under the False Claims Act, where intentional torts and frauds have been perpetrated against the United States in Utah, in Texas, in Louisiana and in Mississippi, by people who are undocumented foreign citizens?"

"STANDARD OF REVIEW: Gray V. American Radiator & Standard Sanitary Corp, 22 Ill 2d 432, 176 NE 2d (1961),"

"Murphy v. Erwin-Wassy, Inc., 460 F. 2d 661, 664 (1st Cir. 1972) "

"Requirements of the United States Constitution: Article III, Section 2."

In argument on this issue, petitioner stated,

"ARGUMENT ON ISSUE NO. 3

"HARRIS COUNTY DISTRICT COURT DID NOT HAVE AUTHORITY TO TRY A CASE AROSE UNDER THE FALSE CLAIMS ACT, WHERE INTENTIONAL TORTS AND FRAUDS HAVE BEEN PERPETRATED

AGAINST THE UNITED STATES IN UTAH, IN TEXAS, IN LOUISIANA AND IN MISSISSIPPI, BY PEOPLE WO ARE UNDOCUMENTED FOREIGN DOMICILES."

"As per Gray V. American Radiator & Standard Sanitary Corp, 22 Ill 2d 432, 176 NE 2d (1961), and as per Murphy v. Erwin-Wassy, Inc., 460 F. 2d 661, 664 (1st Cir. 1972) the jurisdiction ti try the case of intentional torts liabilities in those counties where the victims would be affected. Hence the intentional torts or criminal mine design would not affect the people of Harris County, but would affect the people of the seven counties spreading over four states where the Federal facility sites are located. So the jurisdiction to try the instant case would be in those seven counties and not in the Harris County, Pennoyer v. Neff, 95 U.S. (5 Otto) 714, 24 L.Ed. 565 (1877). This would be the case if the perpetrators were all U.S. domiciles".

"But when the perpetrators were foreign citizens, domiciled in Canada and in other countries, the Harris County court would lack the in personam jurisdiction over the parties to try the case and the instant case can only be tried in a U.S. court."

"Further, the solicitation, bidding and the execution of the Battelle-PBQD/PB-KBB contracts at issue were done from Columbus, Ohio.

Under Burger King v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed 2d. 578, the jurisdiction to try the instant case will be in Ohio. Again, Harris county district court could not try the instant case."

3. Reply to Paul's argument that the State Court did not have jurisdiction over claims that arose in other jurisdiction does not impact the validity of that judgment.

Even if the Texas judgment is valid, res judicata cannot be applied in the instant case. To apply res judicata to have preclusive effect in the instant case, it must be shown that both of the cases could have been brought and tried in the Texas case, which could not be shown. Hence res judicata was improperly applied in the instant case.

C. Reply to Paul improperly raises the district court's underlying decision which is not reviewable in the instant appeal.

The district court violated petitioner's rights guaranteed under the Fifth amendment of the United States Constitution, which is reviewable by this court at any time. Further, the judgment of the district court is void, which is reviewable by this court, when affirmed by the Fifth Circuit Court of appeal.

D. Reply to District Court did not abuse its discretion in denying Paul's rule 60(b)(3) motion, because even assuming

that paul could establish that the defense of his state case was predicated upon factually false evidence, Paul has failed to demonstrate that he was prevented from fully and fairly presenting his state court case.

BMI's argument under this issue is fraudulent. Paul was in California, when the fraudulent evidences were presented to the jury. He was kept away when the fraud was perpetrated on the court. So BMI's argument here is invalid. Further, as per the Supreme Court's holding in Hazel-Atlas Glass Company v. Hartford-empire Company, 322 US 238, the so-called extrinsic and intrinsic fraud is eliminated. the court below should have granted petitioner's motion. Further, petitioner's motion was under 60(b)(4) as well, which deals with void cases, where the courts have no discretion but to grant relief from judgment.

CONCLUSIONS

For the foregoing, the writ of certiorari should be granted.

Respectfully submitted

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